

NOT DESIGNATED FOR PUBLICATION
ARKANSAS COURT OF APPEALS

DIVISION I
No. CA08-427

SUSAN ANTHONY,

APPELLANT

V.

JANET TURNER AND FRANCIS
GRAHAM,

APPELLEES

Opinion Delivered OCTOBER 29, 2008

APPEAL FROM THE GARLAND
COUNTY CIRCUIT COURT,
[NO. CV-07-155-1]

HONORABLE JOHN HOMER
WRIGHT, JUDGE

REVERSED AND REMANDED

SAM BIRD, Judge

Susan Anthony, trustee and beneficiary of the Wirth Living Trust, appeals a December 20, 2007 order of the Garland County Circuit Court that dismissed her complaint for reformation of the trust. Anthony contends that she met her burden of producing evidence sufficient to withstand the “motion for a directed verdict” at the bench trial in this case. She asks us to reverse the trial court’s ruling and remand the case for presentation of further evidence. We reverse, and we remand to the circuit court for a decision on the merits.

When a party moves for a directed verdict in a jury trial or dismissal in a bench trial, it is the duty of the trial court to consider whether the plaintiff’s evidence, given its strongest probative force, presents a *prima facie* case. *Follett v. Fitzsimmons*, ___ Ark. App. ___, ___ S.W.3d ___ (Sept. 3, 2008). It is not proper for the court to weigh the facts at the time the plaintiff completes her case, and the motion should be denied if it is necessary to consider the

weight of the testimony before determining whether the motion should be granted. *Id.* In order to determine whether dismissal should have been granted, the appellate court reviews the evidence in the light most favorable to the party against whom the dismissal was sought, giving the evidence its highest probative value and taking into account all reasonable inferences deducible from it. *Id.* We employ a de novo standard of review when an appellant claims that the trial court erred in granting a motion to dismiss. *Floyd v. Koenig*, 101 Ark. App. 230, ___ S.W.3d ____ (2008).

The Wirth Living Trust was created in 1994 by George Wirth and his wife Marjorie, who became the surviving settlor after Mr. Wirth died in 1997. Anthony and appellees, Janet Turner and Frances Graham, were among the distributees named in a 2001 amendment to receive the trust's nontangible business property upon Ms. Wirth's death, and the amendment specified that all trust property not otherwise distributed under the terms of the trust should be divided equally between Anthony and Graham. Anthony filed her complaint for reformation of the trust in February 2007. The proposed revision would have given Anthony discretion over all of the trust assets.

Anthony's complaint prayed that the circuit court reform the trust to reflect the settlor's intentions under the provision of Ark. Code Ann. § 28-73-415 (Supp. 2007):

A court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

Her complaint alleged that, because of a mutual mistake of fact by both Ms. Wirth and her attorney, Eudox Patterson, he prepared a codicil to Ms. Wirth's will rather than amending the

2001 dispositive provisions of the trust as she had intended.

Anthony's proof at the bench trial consisted of her own testimony, several documents that were introduced into evidence, and testimony by Patterson. Anthony testified that she had served as personal and business accountant for George Wirth and his wife Marjorie after becoming acquainted with them in 1985. Anthony stated that she continued her business relationship with Ms. Wirth after Mr. Wirth's death in 1997 and began taking care of Ms. Wirth's everyday business in 2000 after she had an accident.

Anthony gave the following testimony about three documents prepared by Patterson and executed by Ms. Wirth as surviving trustee in November and December 2001. A trustee's durable power of attorney gave Anthony authority to deal with a brokerage account titled in the name of the trust because "all of [Ms. Wirth's] trust assets were in A.G. Edwards, and they required it" for Anthony to have contact about the account. The first trust amendment removed First Commercial Bank as a successor trustee, leaving Anthony as the only successor trustee, and the second amendment changed disposition of the trust property at Ms. Wirth's death.

Also introduced into evidence was a January 2006 letter that Ms. Wirth typed and sent to Anthony, which we here reproduce:

My dear Susan,

If I need to retype this with any changes I will be glad to do so. I want it to be fully legal.

When I talk of bequests (Frances and Minnie) I would think if there is any money left you might want to give them \$2,000 each.

Do whatever you think is fair and right and possible if I have any funds left.

I love you.

[signature "Marge"]

A second typed and signed page was addressed to "Susan Anthony, Power of Attorney for Marjorie Wirth." It expressed Ms. Wirth's wish that Anthony "handle the proceeds of my estate at her full discretion keeping in mind if there is any money left at the time of my death she may want to make some small bequests." Anthony was instructed to reimburse herself fully for her "time, expenses, love, care and compassion" in helping Ms. Wirth over the years since Mr. Wirth's death. The document stated that Anthony could "keep the entire proceeds" should she wish to do so. Finally, there was mention that Ms. Wirth's daughter, Terri Lange, could have furniture with "movement expenses" paid by the estate, "strictly at Susan Anthony's discretion."

Anthony testified that she faxed and then took the letter and second page to attorney Patterson because Ms. Wirth told her to do so and "have him legally prepare the papers." Anthony stated, "I told him she wanted to re-do her Trust and she wanted to do it legally." Anthony said that she and Patterson had a conversation about Wirth's daughter, Terri Lange, but that Patterson did not indicate how he would handle the typed instructions. Anthony testified that it was common for her to receive Wirth's typed letters.

Patterson, called as a witness for Anthony, stated his belief that the document Anthony gave him contained Ms. Wirth's instructions on how she wanted to change her will. He said Anthony delivered to him Ms. Wirth's typed letter as well as a copy of her will, and Anthony told him that Wirth wanted to change her will. Patterson stated that he prepared a codicil to Wirth's will and took it to her, he discussed the codicil with her, she said she understood every provision in it, and he believed "she did believe" everything in it. He said that he did

not share Anthony's belief that he should have known what assets were in Wirth's "hands" and in her trust. He stated that he did not believe that Wirth made any mistake about what she was doing, that he and she both knew what was going on, and that any statement to the contrary was "just not true."

At the conclusion of Patterson's testimony, Anthony rested and appellees moved to dismiss. The circuit court took the motion under advisement. In a letter opinion the court granted appellees' motion, ruling that there was "nothing presented which would justify invoking A.C.A. § 28-74-415 to reform the terms of the decedent's trust." The court's resultant written order likewise stated that there "was no evidence presented" to justify invoking the statute to reform the trust.

Reviewing the evidence in the light most favorable to Anthony, the party against whom the dismissal was granted, we hold that the trial court's ruling was in error. Anthony's own testimony and Ms. Wirth's typed pages expressing her wishes constituted evidence to make a prima facie case that "both the settlor's intent and the terms of the trust were affected by a mistake of fact," the element required for reformation of a trust under Ark. Code Ann. § 28-73-415. We therefore reverse the grant of the motion to dismiss, and we remand this case to the circuit court for a determination on the merits.

Reversed and remanded.

MARSHALL and VAUGHT, JJ., agree.